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Romi bin Ali v Public Prosecutor

B COURT OF APPEAL (TAWAU) — CRIMINAL APPEAL NO S-05(SH)-351–12 OF 2015
DAVID WONG, ABANG ISKANDAR AND ZAMANI RAHIM JJCA
13 FEBRUARY 2017

C *Criminal Procedure — Appeal against conviction and sentence — Appellant charged with trafficking in dangerous drugs — Whether High Court judge had erred in finding appellant guilty of trafficking — Fact, finding of — Whether finding of fact was based on evidence adduced in case — Whether there was direct or circumstantial evidence pointing to trafficking — Whether element of overt act* D *such as of appellant transacting with another person was proven — Whether High Court judge had imported evidence that was not before court — Whether this was fit and proper case to invoke s 60 of the CJA*

Acting on information received of drug trafficking activities at a place known as E 'Logpond' at Tanjung Batu, Tawau, a group of three policemen visited the area on 4 February 2013. While the police were lying in wait, a green Proton Iswara car drove into the Logpond and parked next to the police vehicle. The car was driven by one Rosliansa bin Kitley ('the second accused') with a person later identified as Romi bin Ali ('the appellant'), seated in the front passenger seat. F When the second accused stepped out of the car, he was arrested by one of the police officers. At the same time, the appellant who attempted to flee was arrested by another of the police officers lying in wait. The police then conducted a search of the Proton Iswara car and found a Quicksilver bag ('the bag'), on the floor at the front seat of the passenger's side where the appellant G was seated in the car. The bag was found to contain packets of, what was later confirmed by a chemist to be, 1156.96g of methamphetamine, a dangerous drug under the Dangerous Drugs Act 1952 ('the Act'). Two other small plastic packets containing crystalline substances that were discovered in the appellant's jeans pocket were confirmed by the chemist to be 0.96g of methamphetamine. H Both the appellant and the second accused were charged for trafficking, under s 39B of the Act. The appellant also faced a second charge of possession under s 12(2) of the Act, in respect of the drugs recovered from his pocket. It was the prosecution's case that the appellant had possession of the bag at all material times because the bag was always in the appellant's custody or control. At the I close of the prosecution case, the trial judge reduced the charge against the appellant from a charge of trafficking to a charge of possession and called him to enter his defence for the two charges against him. The second accused was however, acquitted and discharged at the end of prosecution case. The appellant later pleaded guilty to both the amended charge and the second

charge for possession. The trial judge then sentenced the appellant to 17 years' imprisonment and ten strokes of whipping for the first charge and six months imprisonment for the second charge, with both sentences ordered to run concurrently. On appeal by the public prosecutor against the amended charge, the Court of Appeal allowed the appeal and restored the first charge back to s 39B(1)(a) of the Act and ordered the appellant to enter his defence to that trafficking charge. At the end of the defence case, the High Court judge found the appellant guilty of trafficking and he was convicted and sentenced to death by hanging. The aggrieved appellant filed the instant appeal. The appellant's main contention was that the High Court judge was wrong to conclude that the element of trafficking had been proven by the prosecution against him by misdirecting herself on the presumption under s 37(d) of the Act and direct trafficking under s 2 of the Act. The appellant argued that while possession had been rightly proved, the High Court judge had erred on her positive finding on trafficking by the appellant.

Held, allowing the appeal and sentencing the appellant to 17 years' imprisonment and ten strokes of whipping:

(1) It is settled law that in order to amount to trafficking in drugs, there should be established the element of overt acts on the part of the accused person to deliver the drugs to someone else. It presupposed a conduct of a nature that was reflective of more than mere possession of the drugs. Thus, in a drug trafficking charge, unless the circumstances so warranted, there had to be a two-tier exercise undertaken by the High Court judge, involving two separate findings, namely that of possession and secondly that of trafficking. A finding of possession did not ipso facto, equate an automatic and inevitable finding of trafficking against the accused person by the trial court, as a matter of course. In the context of this appeal, the High Court judge had observed the stipulated two-tier exercise, but after having undertaken such an exercise, she had concluded that both factum of possession and trafficking in the impugned drugs had been established by the prosecution against the appellant (see paras 18–20).

(2) The High Court judge had made a finding of fact that the appellant had incriminated himself in his defence when he said that 'the subject drug was meant to be handed over to another person who will be at the Tanjung Batu River banks to receive'. Besides this factual finding, there was no other incriminating evidence that could attach the factum of trafficking on the appellant. Although the prosecution submitted that there was overwhelming evidence against the appellant, in actual fact there was no direct evidence pointing towards trafficking and at the highest, the High Court judge had only made inferences from the evidence. Evidence that was overwhelming suggested evidence, which was overpowering in nature, or so strong, that it was very difficult to fight against by the adverse party against whom it operated. In the context of

a criminal prosecution, such evidence should be sufficient in law, to amount to proof beyond reasonable doubt. However, the available evidence as adduced in this case was only sufficient to establish the offence of possession but not the offence of trafficking under s 39B(1)(a) of the Act. The element the overt act, such as of the appellant transacting with another person, in order to constitute trafficking should be established by the prosecution through evidence. Otherwise the evidence would only establish possession, which in this case was indeed conceded by the appellant. Further, the circumstantial evidence adduced had fallen short of fulfilling the required standard of proof which was one of beyond reasonable doubt. As such, on the face of the available evidence led in this trial, the conviction for trafficking against the appellant could not, in all fairness, be sustained (see paras 22–30).

(3) The erroneous finding of fact by the High Court judge that was not based on any evidence adduced in the case and was thus, highly prejudicial against the appellant. It was a clear misdirection of a critical nature and was akin to importing 'evidence' which was otherwise, not before the court. It was unfair against the appellant as it amounted to filling in a material gap in the prosecution case which was created by the insufficient evidence led by the prosecution witnesses. As such, on the face of the available evidence led in this trial, the conviction for trafficking against the appellant for trafficking could not, in all fairness, be sustained (see paras 30–32 & 36–38).

(4) The prosecution's argument that the court could invoke s 60 of the Courts of Judicature Act 1964 ('the CJA') had no merit. The determining phrase in the proviso to s 60 of the CJA was that 'no substantial miscarriage of justice has occurred', with the term miscarriage of justice defined essentially to refer to a legal act or verdict that was clearly mistaken, unfair, or improper. Primarily, a miscarriage of justice was the conviction and punishment of a person for a crime they did not commit. In the context of this appeal, which was premised on insufficient circumstantial evidence and the apparent unfairness in the inference arrived at by the High Court judge, substantial miscarriage of justice had been occasioned against the appellant. As such, this was not a fit and proper case in which to invoke the provisions under s 60 of the CJA (see paras 30 & 33–36).

(5) A sentence to be imposed should be one that was according to law and its imposition ought to involve an exercise of judicial discretion. As the appellant was a first offender and there was nothing else that could be taken adversely against him, a sentence of 17 years and ten strokes of the rattan was an appropriate sentence, in the circumstances of this case bearing in mind always, the paramount public interest involved (see para 39).

[Bahasa Malaysia summary

Bertindak atas maklumat yang diterima mengenai aktiviti pengedaran dadah di tempat yang dikenali sebagai 'Logpond' di Tanjung Batu, Tawau, sepasukan tiga orang polis pergi ke kawasan itu pada 4 Februari 2013. Sementara polis sedang menunggu untuk bertindak, sebuah kereta Proton Iswara hijau masuk ke dalam Logpond dan berhenti di sebelah kenderaan polis. Kereta dipandu oleh seseorang bernama Rosliansa bin Kitley ('tertuduh kedua') dengan seorang yang kemudian dikenalpasti sebagai Romi bin Ali ('perayu'), duduk di hadapan tempat duduk penumpang. Apabila tertuduh kedua keluar dari kereta, dia telah diberkas oleh salah seorang pegawai polis. Pada masa yang sama, perayu yang mencuba untuk melarikan diri ditangkap oleh seorang lagi pegawai polis yang menunggu untuk bertindak, polis kemudian melakukan carian ke atas kereta Proton Iswara itu dan menemui beg Quicksilver ('beg'), atas lantai di tempat duduk hadapan bahagian penumpang di mana perayu duduk dalam kereta. Beg didapati mengandungi paket, yang kemudiannya disahkan oleh ahli kimia adalah, 1156.96g methamphetamine, dadah berbahaya di bawah Akta Dadah Berbahaya 1952 ('Akta'). Dua lagi paket kecil mengandungi bahan kristal yang dijumpai dalam poket jeans perayu disahkan oleh ahli kimia adalah 0.96g methamphetamine. Kedua-dua perayu dan tertuduh kedua dituduh untuk pengedaran, di bawah s 39B Akta. Perayu juga menghadapi tuduhan kedua milikan di bawah s 12(2) Akta, berkenaan dengan dadah yang diperolehi daripada poketnya. Adalah kes pendakwaan bahawa perayu telah memiliki beg itu pada kesemua masa yang material kerana beg itu sentiasa dalam jagaan atau kawalan perayu. Pada penutup kes pendakwaan, hakim perbicaraan mengurangkan pertuduhan terhadap perayu daripada tuduhan mengedar kepada pertuduhan milikan dan memanggilnya untuk membela diri bagi kedua-dua pertuduhan yang dihadapinya. Bagaimanapun, tertuduh kedua dibebaskan dan dilepaskan pada akhir kes pendakwaan. Perayu kemudiannya mengaku bersalah terhadap kedua-dua pertuduhan yang dipinda dan tuduhan kedua bagi pemilikan. Hakim perbicaraan kemudian menjatuhkan perayu kepada hukuman penjara 17 tahun dan sepuluh kali sebatan untuk tuduhan pertama dan enam bulan penjara untuk tuduhan kedua, dengan kedua-dua hukuman itu diperintahkan untuk dijalankan serentak. Atas rayuan oleh pendakwa raya terhadap pertuduhan pindaan, Mahkamah Rayuan membenarkan rayuan itu dan memulihkan tuduhan pertama kembali ke s 39B(1)(a) Akta dan mengarahkan perayu membela diri untuk pertuduhan mengedar. Pada akhir kes pembelaan, hakim Mahkamah Tinggi mendapati perayu bersalah mengedar dan dia telah disabitkan dan dihukum gantung sampai mati. Perayu terkilan memfailkan rayuan ini. Hujahan utama perayu adalah hakim Mahkamah Tinggi terkhilaf untuk menyimpulkan bahawa elemen pengedaran telah dibuktikan oleh pendakwaan terhadapnya dengan tersalah arah atas anggapan di bawah s 37(d) Akta dan pengedaran terus di bawah s 2 Akta. Perayu mempertikaikan bahawa sementara milikan telah betul dibuktikan, hakim Mahkamah Tinggi telah

terkhilaf atas dapatan positifnya terhadap pengedaran oleh perayu.

Diputuskan, membenarkan rayuan dan menghukum perayu 17 tahun penjara dan sepuluh sebatan rotan:

(1) Adalah undang-undang tetap bahawa sekiranya untuk merupakan mengedar dadah, hendaklah terbukti ada unsur-unsur perbuatan yang terang-terangan di pihak tertuduh untuk menyerahkan dadah kepada orang lain. Ia mengandaikan kelakuan sifat yang mencerminkan lebih dari sekadar milikan dadah. Oleh itu, dalam pertuduhan pengedaran dadah, melainkan keadaan yang wajar, perlu ada dua peringkat pelaksanaan yang dilakukan oleh hakim Mahkamah Tinggi, yang melibatkan dua dapatan berasingan, iaitu milikan dan kedua adalah pengedaran. Dapatan milikan tidak ipso facto, sama dengan dapatan pengedaran automatik dan tidak dapat dielakkan terhadap tertuduh oleh mahkamah perbicaraan, perkara yang dijangkakan. Dalam konteks rayuan ini, hakim Mahkamah Tinggi telah mengamati pelaksanaan dua peringkat yang ditetapkan, tetapi setelah mengambil pelaksanaan sebegitu, beliau telah memutuskan bahawa kedua-dua fakta milikan dan pengedaran dalam dadah yang dipersoalkan telah dibuktikan oleh pendakwaan terhadap perayu (lihat perenggan 18–20).

(2) Mahkamah Tinggi telah membuat dapatan fakta bahawa perayu telah menunjukkan dia bersalah dalam pembelaannya apabila dia mengatakan bahawa 'the subject drug was meant to be handed over to another person who will be at the Tanjung Batu River banks to receive'. Selain dapatan fakta ini, tiada keterangan menuduh lain yang boleh mengaitkan fakta pengedaran atas perayu. Walaupun pendakwaan menghujahkan bahawa terdapat keterangan yang sangat kukuh terhadap perayu, sebenarnya tiada keterangan langsung yang menunjukkan kepada pengedaran dan paling pun, Mahkamah Tinggi hanya membuat inferens daripada keterangan. Keterangan yang kukuh keterangan yang dicadangkan, yang mana bersifat sangat berkuasa, atau sangat kuat, bahawa adalah terlalu sukar untuk menentang pihak yang menentangnya. Dalam konteks pendakwaan jenayah, keterangan sebegitu sepatutnya mencukupi dari segi undang-undang, untuk membuktikan melampaui keraguan munasabah. Walau bagaimanapun, keterangan yang ada seperti yang dikemukakan dalam kes ini hanyalah mencukupi untuk membuktikan kesalahan milikan tetapi tidak kesalahan pengedaran di bawah s 39B(1)(a) Akta. Unsur yang berlaku secara terang-terangan, seperti perayu yang berurusan dengan orang lain, untuk membentuk pengedaran harus dibentuk oleh pendakwaan melalui keterangan. Jika tidak keterangan hanya akan membuktikan milikan, yang mana dalam kes ini sememangnya diakui oleh perayu. Tambahan lagi, keterangan ikut keadaan yang dikeluarkan telah gagal memenuhi standard bukti yang diperlukan iaitu melampaui keraguan munasabah. Dengan itu, pada

zahir keterangan sedia ada yang dikemukakan dalam perbicaraan ini, sabitan pengedaran terhadap perayu tidak boleh, secara adilnya, dikekalkan (lihat perenggan 22–30).

(3) Kekhilafan dapatan fakta oleh hakim Mahkamah Tinggi yang tidak berasaskan apa-apa keterangan yang dikemukakan dalam kes ini dan oleh itu, sangat prejudis terhadap perayu. Ia adalah nyata satu salah arah yang bersifat kritikal dan sama seperti pengimportan 'evidence' yang sebaliknya, tidak di hadapan mahkamah. Ia adalah tidak adil terhadap perayu kerana ia dikira sebagai mengisi ruang material dalam kes pendakwaan yang dicipta oleh kekurangan keterangan diketuai oleh saksi pendakwaan. Dengan itu, pada zahirnya keterangan sedia ada yang dikemukakan dalam perbicaraan ini, sabitan pengedaran terhadap perayu kerana mengedar tidak boleh, secara adilnya, dikekalkan (lihat perenggan 30–32 & 36–38).

(4) Hujahan pendakwaan bahawa mahkamah boleh menggunakan s 60 Akta Mahkamah Kehakiman 1964 ('AMK') tidak mempunyai merit. Dalam menentukan frasa dalam peruntukan s 60 AMK bahawa 'no substantial miscarriage of justice has occurred', dengan terma salah laksana keadilan yang ditakrifkan secara asasnya merujuk kepada tindakan undang-undang atau keputusan yang jelas salah, tidak adil atau tidak wajar. Terutamanya, satu salah laksana keadilan adalah sabitan dan hukuman terhadap seseorang untuk kesalahan yang tidak dilakukan mereka. Dengan itu, ini bukanlah kes yang betul dan wajar untuk menggunakan peruntukan di bawah s 60 AMK (lihat perenggan 30 & 33–36).

(5) Hukuman yang akan dikenakan hendaklah yang mengikut undang-undang dan pengenaannya sepatutnya melibatkan pelaksanaan budi bicara kehakiman. Memandangkan perayu adalah pesalah pertama dan tiada apa tindakan yang lebih buruk boleh dikenakan terhadapnya satu hukuman selama 17 tahun dan sepuluh sebatan rotan adalah hukuman yang wajar, dalam keadaan kes ini, sentiasa diingati, kepentingan awam adalah yang utama (lihat perenggan 39).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 321–500.

Cases referred to

Chan Chwen Kong v PP [1962] 1 MLJ 307, CA (refd)
Lau Chi Sing v PP [1989] 1 MLJ 5, CA (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (refd)
Ong Ah Chuan v PP; Koh Chai Cheng v PP [1981] 1 MLJ 64, PC (refd)
People v Watson 46 Cal 2d 818, SC (refd)

A *Sia Soon Suan v PP* [1966] 1 MLJ 116, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 60
Dangerous Drugs Act 1952 ss 2, 12(2), 37(da), 39A(2), 39B, 39B(1), 39B(1)(a), First Schedule
B Penal Code s 34

Appeal from: Criminal Trial No 45A-6/6 of 2013 (High Court, Tawau)

C *Ram Singh (Ram Singh Harbans & Co) for the appellant.*
Hamdan bin Hamzah (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abang Iskandar JCA (delivering judgment of the court):

D

THE CHARGE

> Bahawa kamu bersama pada 4hb Februari 2013, lebih kurang jam 6.40 pagi bertempat di tebing sungai Pasir Putih, Tanjung Batu Logpond di dalam Daerah Tawau, di dalam Negeri Sabah, dalam melaksanakan niat bersama, mengedar dadah
E berbahaya iaitu methamphetamine seberat 1155.96 gram dan dengan itu kamu telah melakukan satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s 39B(2) Akta yang sama dan dibaca bersama s 34 Kanun Keseksaan.

F BRIEF FACTS OF THE CASE

[1] At about 2am, on the 4 February 2013, a group of three policemen led by Cpl Justin bin Lakai ('PW2') went to a place known as 'Logpond' at Tanjung Batu, Tawau to verify an information he had received on the trafficking of
G drugs that was going to take place there sometime that day.

[2] Upon arriving there, they took their positions and laid low until about 6.40am when a green Proton Iswara car bearing the registration No SS7921F ('the Iswara car') drove in and stopped next to their car. There were only two
H persons seen inside the Iswara car. They were later identified as Romi bin Ali ('the appellant'), who was seated at the front passenger seat and Rosliansa bin Kitley ('the second accused') who was the driver. The second accused then alighted from the Iswara car and went towards the river bank. There, he was arrested by PW5. In the meantime, PW2 arrested the appellant who was about
I to alight from the front passenger seat of the Iswara car and was allegedly attempting to flee after PW2 identified himself.

[3] PW2 then conducted a search on the said Iswara car and found a black bag of Quicksilver brand on the floor at the front passenger seat. In the bag, he

found two plastic packets of Ali Café Power Root 5-in-1. In the first Ali Café plastic packet, it contained 11 translucent plastic packets containing crystalline substances suspected to be methamphetamine. In the second plastic packet of Ali Café, PW2 found two silver plastic packets also containing crystalline substances suspected to be methamphetamine as well.

[4] Upon conducting a body search on the appellant, PW2 found two small translucent plastic packets containing crystalline substance suspected to be methamphetamine in the right front pocket of the jeans worn by the appellant.

[5] All the suspected substances were seized by the police party. They were then sent to the chemistry department for analysis by the government chemist, who subsequently confirmed that all suspected crystalline substances inside the 11 translucent plastic packets in the first Ali Café packets are methamphetamine weighing 419.26g. The crystalline substances found in the two silver plastic packets in the second Ali Café packets were also confirmed to have contained methamphetamine weighing 736.7g. As to the two small translucent plastic packets found in the appellant's pocket, the chemist also found them to contain methamphetamine weighing 0.96g. Methamphetamine is a dangerous drug as listed in the First Schedule of the Dangerous Drugs Act 1952 ('the DDA 1952').

[6] Both the appellant and the second accused were charged under s 39B of the DDA 1952. The appellant also faced another charge of s 12(2) of the DDA 1952 for the drugs found in the pocket of the pair of jeans that he was then wearing.

[7] At the end of prosecution case, learned High Court judge, YA Chew Soo Ho reduced the charge under s 39B of the DDA 1952 to s 12(2) of the DDA 1952, punishable under s 39A(2) of the DDA 1952 against the appellant and called him to enter his defence. He was also ordered to enter on his defence for the second charge under s 12(2) of the DDA 1952. The second accused however was acquitted and discharged at the end of prosecution case.

[8] The appellant later pleaded guilty to both the amended charge punishable under s 39A(2) of the DDA 1952 and the second charge under s 12(2) of the DDA 1952. The learned High Court judge sentenced him to 17 years' imprisonment and ten strokes of whipping for the first charge. For the second charge, the appellant was sentenced to imprisonment of six months. Both sentences were ordered to run concurrently, effective from appellant's the date of arrest.

[9] On appeal by the public prosecutor against the amended charge, the Court of Appeal ('COA') allowed the appeal and restored the first charge back

to s 39B(1)(a) of the DDA 1952 and ordered the appellant to enter his defence to that trafficking charge. The COA also affirmed the acquittal of the second accused.

[10] At the end of the defence case, the learned High Court judge ('HCJ') found the appellant guilty as per the charge under s 39B(1)(a) of the DDA 1952. He was convicted and was sentenced to death by hanging. This instant appeal before us by the appellant was filed by the appellant who was aggrieved by the decision of the learned HCJ.

THE INSTANT APPEAL

[11] We heard this appeal on 15 November 2016 at Tawau, Sabah. Both learned counsel for the appellant and the learned deputy public prosecutor ('DPP') orally submitted before us. We had sight of the petition of appeal, in which we noted that there were altogether six grounds of appeal having been leveled against the decision of the learned HCJ.

[12] However, before us, Encik Ram Singh, learned counsel for the appellant, indicated to us that he was only pursuing his complaint on the issue pertaining to the adverse finding by the learned HCJ of the element of alleged trafficking of the drugs having been established against the appellant. While he conceded that there was possession having been established against his client, it was nevertheless his contention that the learned HCJ was wrong to conclude that the element of trafficking had been proven by the prosecution against his client. The learned DPP highlighted to us that prosecution had not, in the course of establishing the trafficking charge against the appellant, relied on the presumption of trafficking under s 37(da) of the DDA 1952, but had proceeded to do so by adducing evidence to prove direct trafficking under s 2 of the same DDA 1952.

[13] We now would revert to the petition of appeal filed by the appellant. In the context of what was argued before us, two paras in the said petition of appeal would form the foundation of the appellant's complaint against the adverse decision against him. Those two paras would be paras 2 and 6 therein.

[14] We would first advert to para 6 in the petition of appeal. We reproduce the same for ease of reference:

> Further, the learned trial judge had misdirected herself on the presumption under s 37(d) of the DDA 1952 and direct trafficking under s 2 of the DDA 1952 when she held that:
>
> 59. Accordingly, the accused by the act of transporting the Quicksilver bag which

contained the silver plastic bag which contained the dangerous drug ... under s 2 of the same Act. A

[15] From a reading of that para 6 above, it is apparent to us that it is made up of two parts. The first part relates to a finding of facts. The second part relates to a statement of the law on what would, in law, amount to trafficking in drugs under the DDA 1952. B

[16] Paragraph 2 had set out the impugned decision of the learned HCJ who had made the following crucial finding of facts which appears in para 61 of her grounds of judgment. As was reproduced in para 2 of the petition of appeal, the impugned para 61 reads as follows: C

61. The accused has himself in his defence mentioned that the subject drug was meant to be handed over to another person who will be at the Tanjung Batu River banks to receive. (See page 81, Rekod Rayuan Jenayah). D

[17] We will now deal with the law on trafficking in drugs in the context of the DDA 1952. Section 2 of the DDA 1952 states as follows:

'trafficking' includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug otherwise than under the authority of this Act or the regulations made under the Act; E

F

[18] Although at first blush, proof of mere acts of any of those conducts, *simpliciter*, listed in s 2 would suffice, nevertheless, it had since been interpreted that more than proof of mere factum of any of those conducts was needed by law in order to constitute trafficking. A decision by the Judicial Committee of the Privy Council in drug trafficking case emanating from Singapore, was instrumental in shedding more light on what would in law amount to trafficking in drugs. Something more was required to constitute trafficking than mere evidence of any of those listed conducts, *simpliciter*. That 'extra' bit of evidence that was needed to constitute trafficking was explained with great clarity by the Privy Council, no less, in the speech by Lord Diplock in the case of *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64. We felt compelled to reproduce in some length, what the great jurist had said, so as not to derogate in any way from what was succinctly encapsulated by the eminent Law Lord. The 'overt act' in drug trafficking requirement was postulated in the following terms: G H I

To 'traffic' in a controlled drug so as to constitute the offence of trafficking under s 3 involves something more than passive possession or self-administration of the drug; it involves doing or offering to do an overt act of one or other of the kinds specified in para (a) of the definition of 'traffic' and 'trafficking' in s 2. Even apart from any

statutory definition, the ordinary meaning of the verb 'to traffic', in the particular context of trafficking in goods of any kind, imports the existence, either in fact or in contemplation, of at least two parties: a supplier and a person to whom the goods are to be supplied. This concept, involving transfer of possession, is reflected in the statutory definition itself. Of the seven verbs used to describe the various kinds of overt acts which constitute trafficking 'transport' is sandwiched between 'sell, give, administer' which precede it and 'send, deliver or distribute' which follow it. All of these other verbs refer to various ways in which a supplier or distributor, who has drugs in his possession, may transfer possession of them to some other person. 'Transport', although it must involve possession of the drugs by the person who transports them, is the only member of the heptad of verbs that is not inconsistent with the retention of possession of the drugs by him after their transport. It must mean moving the drugs from one place to another; it may mean moving them also to another person but it need not do so. Whether it bears the wider or the narrower meaning depends upon the context in which the verb appears. In their Lordships' view the immediate context of the verb 'transport', to which attention has been drawn, attracts the maxim *noscitur a sociis*. This, and the fact that it appears in the definition of the verb to 'traffic', of which the natural meaning in the context of trafficking in goods involves dealings between two parties at least, and that the evident purpose of the Act is to distinguish between dealers in drugs and the unfortunate addicts who are their victims, all combine to make it clear that 'transport' is not used in the sense of mere conveying or carrying or moving from one place to another but in the sense of doing so to promote the distribution of the drug to another. Supplying or distributing addictive drugs to others is the evil against which s 3 with its draconian penalties is directed.

The Court of Appeal of British Columbia in *R v McDonald* [1963] 43 WWR 337, at p 342, interpreted 'transport' in the virtually identical definition of 'traffic' in the Canadian Narcotic Control Act, 1960–61, as bearing this restricted meaning and the same interpretation was adopted by the Court of Appeal of Newfoundland in *R v Greene* [1977] 74 DLR 3d 354. Acceptance of it is implicit in the *ratio decidendi* of the Court of Criminal Appeal of Singapore in *Wong Kee Chin* (*ubi sup*).

So, simply to transport from one place to another a quantity of a controlled drug intended for one's own consumption, if unauthorised by the Act or Regulations, involves an offence of having the drug in one's possession under s 6 but does not amount to the offence of trafficking under s 3. It is otherwise, however, if the transporter's purpose, whether it is achieved or not, is to part with possession of the drug or any portion of it to some other person whether already known to him or a potential purchaser whom he hopes to find. This is the consequence of s 10 of the Drugs Act and s 3(c) (which covers the same ground in part). These provisions make the question whether the transporter of the drugs achieves that purpose irrelevant to his guilt of the offence of trafficking under s 3; since they provide that a person who does any act preparatory to, or in furtherance of, or for the purpose of the commission of the offence of trafficking in a controlled drug, shall be guilty of the substantive offence of trafficking and liable on conviction to the penalty provided for it under s 29 and the Second Schedule.

This is a very wide description of acts that may be treated as equivalent to the substantive offence of trafficking; nevertheless, in Their Lordships' view, it is clear

from the structure of the Drugs Act and the distinction drawn between the offence of having a controlled drug in one's possession and the offence of trafficking in it, that mere possession of itself is not to be treated as an act preparatory to or in furtherance of or for the purpose of trafficking so as to permit the conviction of the possessor of the substantive offence. To bring the provisions of ss 10 and 3(c) into operation some further step or overt act by the accused is needed, directed to transferring possession of the drug to some other person; and it is a consequence of the clandestine nature of the drug trade and the means adopted for the detection of those engaged in it, that the further step that the prosecution is most likely to be able to prove in evidence is the act of the accused in transporting the drug to some place where he intends to deliver it to someone else, whether it be the actual consumer or a distributor or another dealer.

[19] It was clear from the decision in *Ong Ah Chuan* case that in order to amount to trafficking in drugs, there must be established the element of overt acts on the part of the accused person to deliver the drugs to someone else. It presupposes a conduct of a nature that is reflective of more than mere possession of the drugs. Indeed, possession, if proven by the prosecution, is an offence in itself, quite apart and distinct, as it were, from the offence of trafficking. Thus in a drug trafficking charge, unless the circumstances so warrant, there has to be a two-tier exercise undertaken by the HCJ, involving two separate findings, namely that of possession and secondly that of trafficking. A finding of possession does not ipso facto equate an automatic and inevitable finding of trafficking against the accused person by the trial court, as a matter of course. The decision of the apex court in the case of *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169 through the speech by learned Justice Azmi Kamaruddin SCJ is highly instructive in that regard and we now reproduce the relevant portion of his speech, for ease of convenience:

Unless the evidence in a particular case does not obviously so warrant, it is incumbent for the court to consider whether on a balance of probability in the evidence the defence has rebutted the statutory presumption of trafficking under s 37(da) as a separate exercise even though the court is satisfied on balance that the presumption of possession under s 37(d) has not been rebutted. In this case, the failure to do so was a material misdirection and was fatal to the conviction.

[20] In the context of this appeal, the learned HCJ observed the two-tier exercise, as enunciated in the *Mohd Radhi* case. Having undertaken such an exercise, she had concluded that both factum of possession and trafficking in the impugned drugs had been established by the prosecution against the appellant. Now before us, the appellant was saying that while possession was rightly arrived at, she had however erred on her positive finding on trafficking by the appellant, thereby leading to his client's conviction on the charge under s 39B(1) of the DDA 1952. Our task was to determine whether the conviction entered against the appellant under s 39B(1)(a) of the DDA 1952 was justified and thus sustainable in law.

[21] As can be readily recalled, the prosecution had relied on s 37(d) of the DDA 1952 to prove possession and by way of direct evidence ie transporting and carrying under s 2 of the DDA 1952 to prove the appellant's guilt for trafficking in the drugs.

[22] According to the learned DPP, the evidence led revealed that the 1156.96g methamphetamine seized by PW2 found in the Quicksilver bag (P37) which was seized from the floor at the front seat of the passenger's side where the appellant was seated in the car. The appellant started his journey from Lahad Datu to Tawau during which, at all material time he was in the possession of the Quicksilver bag containing the drugs. Nothing in the evidence to show that the bag was left from his custody or control. The appellant went as early as 6am to Logpond in order to camouflage his illegal activity. It was submitted before us that despite the fact that there was no direct evidence before the learned HCJ for her to find on trafficking, it was not fatal because the court could invoke s 60 of the Courts of Judicature Act 1964, due to overwhelming evidence before the court.

[23] Now, we have to revisit paras 2 and 6 of the petition of appeal filed by the appellant. Paragraph 6 in part referred to transporting and para 2 made a finding that it was the appellant's own evidence that had self-incriminated against himself. That piece of evidence if it was indeed available and in evidence, would constitute the proverbial smoking gun that would necessarily deal a fatal blow to the appellant's case. In other words, the finding in para 61 of the learned HCJ's decision had provided the crucial link that had made the entire and cumulative conduct of the appellant one that would in law constitute trafficking in the drugs in line with the test as laid down in the *Ong Ah Chuan*'s case. The alleged finding by the learned HCJ would provide the transacting element between the appellant and someone else. That evidence of some overt acts would complete the loop that needed to be closed in order to constitute what in law is direct trafficking in drugs.

[24] We had occasion to look at the records of appeal. Of particular purpose, we had set out to look out for the evidence which the learned HCJ had found to be highly incriminating emanating from the appellant himself. It is to be recalled that the learned HCJ had made a finding of fact against the appellant as follows:

> 61. The accused has himself in his defence mentioned that the subject drug was meant to be handed over to another person who will be at the Tanjung Batu River banks to receive.

[25] Having perused through the defence evidence where the evidence was supposed to have resided according to the learned HCJ, we were unable to locate any such evidence coming from the appellant.

[26] Now, the consequences of the learned HCJ finding in para 61 of her grounds of decision were indeed dire against the appellant. Besides that factual finding, there was no other incriminating evidence that could attach the factum of trafficking on the appellant. The law on trafficking is clear. We agreed with the learned HCJ that trafficking would still be established against an accused person facing a charge under s 39B(1) of the DDA 1952 even if the intended purpose of trafficking was not achieved by such an accused person. She had referred to the Singapore case of *Lau Chi Sing v Public Prosecution* [1989] 1 MLJ 5. However, for that to happen, the essential element of passing the drugs to another person must nevertheless first be proven by the prosecution. Absent that, the trafficking charge will not stick against the accused person.

[27] The learned DPP before us submitted that there was overwhelming evidence against the appellant that could justify this court to nevertheless convict the appellant of drug trafficking. True to the highest standard of professional ethics, he was frank and candid to admit that there was no such evidence emanating from the appellant which the learned HCJ had premised her finding in para 61 of her grounds of judgment. He then had urged this court to invoke s 60 of the Courts of Judicature Act 1964 to sustain the conviction that had been entered against the appellant.

[28] Having perused the evidence in the records of appeal, we could not, with respect, agree with the learned DPP that there was overwhelming evidence that had militated against the appellant in order for us to invoke the provisions under s 60 of the Courts of Judicature Act 1964. There was no direct evidence pointing towards trafficking and at the highest, the learned HCJ had made inferences from the evidence as can be seen in para 60 of her grounds of judgment. We reproduce para 60 of the grounds of judgment below:

> It is trite law that mere keeping, concealing or carrying of the drug is not sufficient to constitute trafficking, there must be proof of the purpose of which an act is done and in the absence of an express admission by the accused, the purpose with which he did an act is a matter of inference from what he did. Thus, in this instant case, the accused was caught in the act of conveying from Lahad Datu, Silam district to Tawau drugs of which the amount involved is 1155.95g much larger than is likely to be needed for his own consumption. Thus the court will draw an inference that the drugs were definitely carried by the accused for the purpose of trafficking. As stated in the Singapore case of *Lau Chi Sing v PP*, the offence is completed once there is an act of transportation so long as its purpose is to transfer possession for some other person in contradistinction to an intention to keep the drug solely for one's own consumption. Whether the transporter achieves his purpose is irrelevant to his guilt of the offence of trafficking.

[29] We must reiterate here, lest we be misunderstood, that the law does not say that the trafficking charge must be proved, or can only be proved, by

adducing direct evidence. Indeed, like any other criminal offences, it may be proved by way of circumstantial evidence. In that regard, circumstantial evidence, in order to be capable of forming a basis for a conviction in a capital offence, the various strands of such evidence taken together must be such that they create a rope strong enough to hang the accused person. The case of *Chan Chwen Kong v Public Prosecutor* [1962] 1 MLJ 307 illustrates the heavy onus that bears down on the shoulders of the prosecution that relies on circumstantial evidence to secure a conviction. Pike CJ (Borneo) had occasion to say:

> The onus on the prosecution where the evidence is of circumstantial nature is a very heavy one and that evidence must point irresistibly to the conclusion of the guilt of the accused. If there are gaps in it, then it is not sufficient. But that does not alter the standard of proof that rests on the prosecution for it to discharge in order for it to secure a conviction, namely proof beyond reasonable doubt, whether the evidence that it adduces in court be circumstantial or direct in nature (see the case of *PP v Oh Laye Koh* [1994] 2 SLR 120).

[30] With respect, the evidence that was adduced in this case could hardly be described as being overwhelming. We were always mindful of the standard of proof that is required of all prosecutions which is to prove the charge preferred against an accused person beyond reasonable doubt. Evidence that is overwhelming suggests evidence which is overpowering in nature, so strong that it is very difficult to fight against by the adverse party against whom it operates. In the context of a criminal prosecution, such evidence must be sufficient in law, to amount to proof beyond reasonable doubt. The available evidence as adduced was sufficient to establish the offence of possession. On that there was no quarrel. But as regards the offence of trafficking under s 39B(1)(a) of the DDA 1952 the circumstantial evidence adduced had fallen short of fulfilling the required standard of proof which is one of beyond reasonable doubt. Indeed, the learned HCJ had to make the finding in para 61 of her grounds of judgment so as to bolster her decision on trafficking because the loop needed to be closed. But unfortunately, there was no such evidence adduced or recorded, as appeared within the four walls of the records of appeal pertaining to this case. The element the overt act, such as of the appellant transacting with another person, in order to constitute trafficking must be found to be established by the prosecution through evidence. Otherwise the evidence would only establish possession, which in this case was indeed conceded by learned counsel for the appellant. As such, with respect, we were of the considered view that this was not a fit and proper case in which we ought to invoke the provisions under s 60 of the Courts of Judicature Act 1964.

[31] So, without the erroneous finding by the learned HCJ in para 61 of her grounds of judgment, the charge for trafficking against the appellant could not stand, in law. Such a finding was highly prejudicial against the appellant

because it was made without any factual foundation. It was a clear misdirection of a critical nature on the part of the learned HCJ. It was akin to importing 'evidence' which was otherwise, not before the court. It was unfair against the appellant as it amounted to filling in a material gap in the prosecution case which was created by the insufficient evidence led by the prosecution witnesses.

[32] As such, on the face of the available evidence led in this trial, the conviction for trafficking against the appellant under s 39B(1)(a) of the DDA 1952 could not, in all fairness, be sustained. However strong the court may feel towards the outcome of a case, one way or the other, in the penultimate exercise of judicial power, it must be guided only by the available evidence that has been led before it and to hence direct its mind accordingly. Nothing else matters. In the Federal Court case of *Sia Soon Suan v Public Prosecutor* [1966] 1 MLJ 116 learned Justice Ong Hock Thye FJ had occasion to say at p 118 the following:

> the requirements of strict proof in a criminal case cannot be relaxed to bridge any material gap in the prosecution evidence. Irrespective of whether the court is otherwise convinced in his own mind of the guilt or innocence of an accused, its decision must be based on the evidence adduced and nothing else ...

[33] The learned DPP had urged us to the invoke the proviso in s 60 of the Courts of Judicature Act 1964 as there was, as submitted by him, overwhelming evidence against the appellant. We had expressed our view on the strength of the overall evidence in respect of the charge for trafficking, which was undisputed to have been circumstantial in nature. Ought the proviso to s 60 of the Courts of Judicature Act 1964 be invoked to assist the prosecution in the circumstances of this case? We reproduce the proviso to s 60 of the Courts of Judicature Act 1964 as follows:

> Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

[34] The determining phrase in the said proviso, to our minds, is that 'no substantial miscarriage of justice has occurred'. The term 'miscarriage of justice' has been defined essentially to refer to a legal act or verdict that is clearly mistaken, unfair, or improper. Primarily, a miscarriage of justice is the conviction and punishment of a person for a crime they did not commit.

[35] A miscarriage of justice is declared only when the court, after an examination of the entire cause including the evidence, is of the opinion that it is reasonably probable that a result more favourable to the appealing party would have been reached in the absence of the error (see *People v Watson* 46 Cal 2d 818 836 (Cal 1956)).

[36] In the context of this appeal before us, premised on our views on the insufficient circumstantial evidence and the apparent unfairness in respect of para 60 by the learned HCJ, we were of the considered view that the conviction for the trafficking charge that was entered against the appellant, substantial miscarriage of justice had been occasioned against him. As such, we were not convinced that the circumstances surrounding the conviction under s 39B(1)(a) of the DDA 1952 against the appellant had warranted us to invoke the proviso to s 60 of the Courts of Judicature Act 1964, in order that the said conviction may be affirmed.

CONCLUSION

[37] The total sum of our deliberation of this appeal was that the learned HCJ had not erred on the law on what amounted to trafficking in drugs. In fact, she had admirably stated the law correctly as could be seen in the grounds of her judgment. But where she had erred, in our respectful view, was when she had concluded that there was sufficient evidence against the appellant for trafficking as per the charge, beyond reasonable doubt. In particular, it was her finding that was housed in para 61 of her grounds of judgment and repeated verbatim in para 2 of the appellant's petition of appeal. With respect, as alluded by us in the preceding paragraphs of our judgment, we had not been able to sustain her conviction against the appellant for the drug trafficking charge. In our considered view, para 61 had been unfair against the appellant. The bedrock of a criminal trial is grounded upon the concept of fairness to all parties, in as much as it is about the sufficiency of appreciation of admissible evidence led before the court. In the context of what had transpired in this case, we found that it was entirely unsafe to affirm or sustain the conviction that was entered against the appellant on the charge for drug trafficking. We had found that there was merit in the appellant's complaint in that regard.

[38] In the upshot therefore, we allowed the appeal by the appellant on the drug trafficking charge. As such, we had set aside the conviction under s 39B(1)(a) of the DDA 1952 entered against the appellant, and the death penalty imposed on the appellant, by the learned HCJ. However, we found the prosecution had on the available evidence, successfully proven a case of possession beyond reasonable doubt. Therefore, we found the appellant guilty under s 12(2) of the DDA 1952 punishable under s 39A(2) of the same Act. We thus had convicted the appellant under s 12(2) of the DDA 1952.

[39] We had heard submissions by both learned counsel on mitigation. The maximum imprisonment term provided by law was 30 years and minimum ten strokes of the rattan. Learned counsel submitted that 12 to 15 years ought to be the range of the imprisonment term and ten strokes of the rattan, whereas learned DPP submitted that a deterrent sentence must be imposed against the

appellant and urged this court to impose at least 17 years' imprisonment term and ten strokes of the rattan. Having considered the respective submissions, we imposed a sentence of 17 years' of imprisonment on the appellant, with effect from the date of his arrest, namely, on 4 February 2013 and ten strokes of rattan. We noted that when the charge was reduced to one of possession at the end of the prosecution case by the first trial judge, the appellant had pleaded guilty and was sentenced to 17 years imprisonment and ten strokes of the rattan. When the COA ordered him to enter on his defence for the trafficking charge, he was facing a potential death penalty if convicted thereon. It was only reasonable to expect him to resist the charge with all his might at his disposal. He ought not to be severely penalised more than legally necessary, merely on account of him having exercised his right to deflect a charge that carried a mandatory death punishment on conviction. A sentence to be imposed must be one that is according to law and its imposition involves an exercise of judicial discretion. We noted that he was a first offender and there was nothing else that could be taken adversely against him. We were of the view that a sentence of 17 years and ten strokes of the rattan was an appropriate sentence, in the circumstances of this case bearing in mind always, the paramount public interest involved.

[40] We had so ordered accordingly.

Appeal allowed, appellant sentenced to 17 years' imprisonment and ten strokes of whipping.

Reported by Kohila Nesan